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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

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THE PEOPLE,

Plaintiff and Respondent,

v.

KELLYANN NICOLE MORTIMER,

Defendant and Appellant.

C046732

(Super. Ct. No. P02CRF0408)

Defendant Kellyann Nicole Mortimer entered a negotiated plea of no contest to being an accessory after a felony (attempted murder) in violation of Penal Code section 32<sup>1</sup> and admitted serving a prior prison term within the meaning of section 667.5, subdivision (b). In exchange for her plea and a promise to testify at the trial of the codefendant, charges of attempted murder (§§ 664/187) and vehicle theft (Veh. Code,

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

§ 10851, subd. (a)) were to be dismissed at the time of sentencing.

After defendant had testified in the codefendant's trial, the trial court sentenced defendant to a total prison term of three years comprised of a two-year middle term for her conviction of violating section 32 and a consecutive one-year enhancement pursuant to section 667.5, subdivision (b). The remaining charges against defendant were dismissed.

Defendant's sole contention on appeal is that the trial court's order requiring her to pay \$460 for the cost of preparing the probation report pursuant to section 1203.1b must be reversed because it was unsupported by substantial evidence that she had the ability to pay such cost. We affirm the judgment.

#### BACKGROUND

On July 31, 2002, defendant and codefendant Kenneth Reese pulled into a Jack-in-the-Box parking lot with their truck radio playing loudly. The driver of the vehicle next to them, Jeremy Cortese, in turn, turned his radio up "full blast, just to piss [Reese] off." Cortese initiated a conversation and tried to "act tough." However, when Cortese tried to back out of his parking space to leave, Reese backed out and blocked Cortese. Reese reached across defendant with a handgun and shot Cortese in the chest. Reese and defendant fled. Their truck was found abandoned in Placerville the next day. Two days later defendant arranged to have her mother pick her and Reese up and drive them back to the Los Angeles area.

## DISCUSSION

Section 1203.1b, subdivision (a), provides that in any case in which a defendant has been convicted and a presentence probation report is prepared, the probation officer shall make a determination of defendant's ability to pay all or some of the reasonable costs of preparing that report. The statute requires the probation officer to inform the defendant he or she has a right to have the court determine his or her ability to pay and the payment amount. The defendant may waive the right to such a determination only by a knowing and intelligent waiver.

(§ 1203.1b, subd. (a).) Absent such a waiver, the trial court must conduct an evidentiary hearing to determine if the defendant has the ability to pay and the manner of any such payments. (§ 1203.1b, subd. (b); *People v. Hall* (2002) 103 Cal.App.4th 889, 892-893.) After the initial determination of defendant's ability to pay, section 1203.1b authorizes a defendant who experiences a change of circumstances to petition the probation officer for review of his or her ability to pay or the trial court to modify or vacate its judgment requiring payment. (§ 1203.1b, subd. (f).)

Subdivision (e) of section 1203.1b defines defendant's "ability to pay" to include consideration of defendant's present financial position, his or her reasonably discernible future financial position (limited to a one-year perspective), the likelihood of defendant's obtaining employment within a year, and any other factors that may bear on defendant's financial capability to reimburse the county for costs.

Defendant does not challenge any failure to follow the procedures prescribed by section 1203.1b. She expressly limits her claim on appeal to the substantive issue of the evidence supporting the finding of her ability to pay, implied by the court's order requiring her to pay the cost of the probation report. Pointing to her representation by a public defender and her sentence to state prison, defendant claims the record does not support the court's implied finding that she had the ability to pay the \$460 probation report fee imposed pursuant to section 1203.1b.

Respondent argues two grounds for finding defendant has waived her right to raise this issue on appeal.

First, respondent contends defendant's general waiver of her right to appeal given in connection with her negotiated plea waived her right to raise this issue. We disagree. A review of the record reflects the trial court only advised defendant that there "may be some fines and fees associated with entering a plea of guilty or no contest." The court never advised defendant of the possibility of being required to pay for the probation report. A defendant's general waiver of the right to appeal, given as part of a negotiated plea agreement, will not be construed to bar the appeal of sentencing issues that were left unresolved by the plea agreement. (*People v. Panizzon* (1996) 13 Cal.4th 68, 85.)

Second, respondent argues defendant waived her contention by her failure to object to the imposition of the probation report fee in the trial court. (*People v. Valtakis* (2003) 105

Cal.App.4th 1066, 1068.) We agree the failure to object in the trial court forfeited the issue for appeal.<sup>2</sup>

The probation officer in the probation report specifically recommended the trial court find defendant able to pay \$460 for the cost of the probation report. Defense counsel stated he had an opportunity to review the report and recommendations. Defense counsel challenged another part of the report without objecting to the probation report's recommendation regarding defendant's ability to pay the cost of the probation report or to the court's order imposing the cost of the report.

In *People v. Valtakis, supra*, 105 Cal.App.4th 1066, the Court of Appeal specifically found a failure to object at the trial court level to probation fees and costs imposed under section 1203.1b waived the claim on appeal. The court stated: "'In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' [citation], which is exactly the claim here: the probation fees, otherwise permitted, were procedurally flawed (for absence of notice, a hearing or a finding) and factually flawed (for absence of evidence that the defendant had the ability to pay)." (*People v. Valtakis, supra*, at p. 1072, quoting *People v. Scott* (1994) 9 Cal.4th 331, 354.)

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<sup>2</sup> "Forfeiture" is the correct legal term to describe the loss of the right to raise an issue on appeal due to the failure to raise it in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

Defendant tries to avoid this result by arguing her substantial evidence claim is an exception to this general rule. The case on which defendant principally relies is distinguishable.

In *People v. Butler* (2003) 31 Cal.4th 1119, the California Supreme Court considered a challenge to an HIV testing order made pursuant to section 1202.1. The trial court's authority to order the test required both defendant's conviction of an enumerated offense and a finding by the trial court of probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim. (*People v. Butler, supra*, at pp. 1125-1126.) The Supreme Court concluded a defendant forfeits the procedural claim that the trial court failed to make the required finding of probable cause by failing to object at the trial court level. (*Ibid.*; *People v. Stowell* (2003) 31 Cal.4th 1107, 1113-1115.) In contrast, the Supreme Court held a defendant can raise, without a prior objection, a claim that the finding of probable cause is not supported by substantial evidence. (*Butler, supra*, at p. 1127.) It carefully noted, however, this conclusion was required by the specific terms of section 1202.1 and the general mandate that involuntary HIV testing is strictly limited by statute. (*Butler, supra*, at p. 1128, fn. 5.) "For this reason, nothing in our analysis should be construed to undermine the forfeiture rule of *People v. Scott, supra*, 9 Cal.4th 331, that absent timely objection[,], sentencing determinations are not reviewable on appeal, subject

to the narrow exception articulated in *People v. Smith* (2001) 24 Cal.4th 849 [obvious legal errors correctable without referring to factual findings or remanding for further finding not waived].” (*Ibid.*)

We conclude the forfeiture rule of *People v. Scott*, *supra*, 9 Cal.4th 331, precludes review of defendant’s claim on appeal. (*People v. Valtakis*, *supra*, 105 Cal.App.4th 1066.) However, even if we were to conclude otherwise, reversal would not be required.

The probation report contains a statement from defendant. On the bottom of that statement, defendant checked the box affirmatively indicating she has the financial ability to pay all court-ordered fees and fines including probation supervision costs. Defendant declined to fill out the financial declaration attached to her statement. Instead, she wrote “N/A,” which we take to mean “not applicable,” on each section of the declaration. Moreover, the probation report reflects defendant was employed for four to five months during the time she was awaiting trial making \$2,400 a month. Defendant’s employer wrote a letter to the trial court regarding defendant’s sentencing that confirms defendant was working as an intern for the property department of a production company in Southern California. It is possible defendant had savings from such employment. In these circumstances, substantial evidence supports the trial court’s implied finding of defendant’s ability to pay \$460 for the cost of the probation report,

despite defendant's legal representation by the public defender  
and her sentence to state prison.

DISPOSITION

The judgment is affirmed.

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CANTIL-SAKAUYE, J.

We concur:

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RAYE, Acting P.J.

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ROBIE, J.